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Supreme Court, U.S.
FILED
SEP 29 1993
OFFICE OF THE CLERK

No. 92-780

In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* OF OHIO RIGHT TO LIFE SOCIETY, INC., CLEVELAND LAWYERS FOR LIFE, INC., PHYSICIANS FOR LIFE, INC. IN SUPPORT OF RESPONDENTS

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Dated: September 29, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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35 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. CONGRESS DID NOT CLEARLY INTEND SECTION 1962(C) OF RICO TO REACH ENTERPRISES OR PREDICATE ACTS THAT ARE NON-ECONOMIC 4

A. "Enterprise" and the Requisite Motivation for Predicate Acts Are Ambiguous Concepts within RICO 5

B. The Clear Statement Rule Requires That Congress Clearly Show That 18 U.S.C. § 1962(c) Was Intended to Apply to Non-Economic Enterprises or Predicate Acts 9

1. Congress Did Not Clearly Intend to Alter So Dramatically the Federal-State Balance by Including Non-Economic Enterprises or Predicate Acts within the Prohibitions of RICO 15

2. The States' Core Power to Enforce Their Own Criminal Laws May not be Altered or Delegated to Politically Unaccountable Agents by Congress without an Explicit Statement of Intent 19

II. UNDER THE RULE OF LENITY, ANY AMBIGUITY IN THE MEANING OF ENTERPRISE OR IN THE MOTIVATION FOR PREDICATE ACTS SHOULD BE RESOLVED IN FAVOR OF THE LESS HARSH PUNISHMENT 23

CONCLUSION 25

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 12

Addington v. Texas, 441 U.S. 418 (1978) 13

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)..... 20

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 12, 14

Bell v. United States, 349 U.S. 81 (1954)..... 24

Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1985) 16

City of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) 9, 13

Deal v. United States, 113 S.Ct. 1993 (1993) 6

EEOC v. Arabian American Oil Co., 111 S.Ct. 1227 (1991) 12

EEOC v. Wyoming, 460 U.S. 226 (1983) 12

FERC v. Mississippi, 456 U.S. 742 (1982) 21

Florida v. United States, 282 U.S. 194 (1931)..... 16

FMC Corp. v. Holliday, 111 S.Ct. 403 (1990)..... 7

Garcia v. Metropolitan Transit Auth., 469 U.S. 528 (1985) 11

Gregory v. Ashcroft, 111 S.Ct. 2395 (1991) 11, 17, 19, 20

Hilton v. South Carolina Pub. Rys. Comm'n, 112 S.Ct. 560 (1991)..... 13

H.J. v. Northwestern Bell Tel. Co., 109 S.Ct. 2893 (1989) 17, 23

Jones v. Rath Packing Co., 430 U.S. 519 (1977)..... 12

TABLE OF AUTHORITIES – Continued

Page

Kent v. Dulles, 357 U.S. 116 (1958) 12

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 11

McNally v. United States, 483 U.S. 350 (1987) 19

Morrison v. Olson, 487 U.S. 654 (1988) 19, 21

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 12

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 12

NOW v. Scheidler, 968 F.2d 612 (7th Cir. 1992) ... 1, 5, 9

New York v. United States, 112 S.Ct 2408 (1992) 22

Northeast Women's Ctr. v. McMonagle, 889 F.2d 466 (3rd Cir. 1989) 21

Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981) 12

Plount v. American Home Ins. Co., 668 F. Supp. 204 (S.D.N.Y. 1987) 8

Reves v. Ernst & Young, 113 S.Ct. 1163 (1993) 8, 18

Rewis v. United States, 401 U.S. 808 (1970) 16

Russello v. United States, 464 U.S. 16 (1983) 8

Santa Fe Indus. v. Green, 430 U.S. 462 (1977) 22

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) ....*passim*

Smith v. United States, 113 S.Ct. 2050 (1993) 6

Sparf and Hansen v. United States, 156 U.S. 51 (1895) 24

United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Bass, 404 U.S. 336 (1971) 9, 11, 19

United States v. Enmons, 410 U.S. 396 (1973) 25

United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) 5

United States v. Masters, No. 88-CR500-1, 1989 U.S. Dist. LEXIS 6142 (N.D.Ill. May 12, 1989) 8

United States v. Rodgers, 461 U.S. 677 (1983) 10

United States v. Turkette, 452 U.S. 576 (1981) ... 8, 15, 18

United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218 (1952) 24

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 24

United States v. Yokley, 542 F.2d 300 (1976) 19

West Helena S. & L. v. Federal Home Loan Bank Bd., 417 F. Supp. 220 (1976), *aff'd*, 553 F.2d 1175 (8th Cir. 1977) 22

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1988) 9, 12

STATUTES, LEGISLATIVE MATERIALS

15 U.S.C. § 26 (1983) 16

18 U.S.C. § 1951 (1989) 15

18 U.S.C. § 1961(1) (1989) 4, 8, 16

18 U.S.C. § 1962(c) (1989) ..... *passim*

18 U.S.C. § 1963(a)(1) (1989) 8

18 U.S.C. § 1964(c) (1989) 3, 4, 16, 19, 21, 23

TABLE OF AUTHORITIES – Continued

Page

U.S. CONST. art. I, § 8 10

U.S. CONST. art. VI 11

Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 922 (1971) 1, 17

Racketeer Influenced and Corrupt Organizations Act Pub.L. 91-452, Title IX, 84 Stat. 941 (1971) ..... *passim*

Pub.L. 91-452, § 904(a), 84 Stat. 947 (1971) 17

116 CONG. REC. S18940 (daily ed. June 9, 1970) 17

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (6th ed. 1990) 7

Evan Carminker, *A Norm-based Remedial Model for Underinclusive Statutes*, 95 YALE L. J. 1185 (1986) 12

REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (1965) 6, 7

William Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) 13

JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) 24

C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING (8th ed. 1948) 6

OXFORD ENGLISH DICTIONARY (2d ed. 1989) 6

SANDS, SUTHERLAND STAT. CONST. (4th ed. 1984) 6, 7, 8

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 10, 17

WEBSTER'S NEW 20TH CENTURY DICTIONARY (2d ed. 1983) 7

TABLE OF AUTHORITIES – Continued

Page

Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221 (1973)..... 10

INTEREST OF AMICI

Amici Ohio Right To Life Society, Inc., Cleveland Lawyers for Life, Inc., and Physicians for Life, Inc., are not-for-profit organizations of citizens and professionals seeking to secure respect and protection for human life at all stages of being by legal means. Amici do not subscribe to non-legal forms of protest. Nonetheless, aware of the great moral and emotional contest over the issue of abortion, Amici do not believe that it would serve the cause of informed public debate for the contest to focus on the courts, especially through unconstrained private suits. Amici do not believe that Congress intended, nor the text or history of the RICO statute permit, the extension of the criminal and the extraordinarily flexible civil action provisions to cover non-economic entities or non-economic motivations for predicate acts. To transform ambiguous provisions into actionable predicates would go beyond congressional intent, alter the federal-state balance, and further exacerbate the rancorous debate over the issue of abortion.

SUMMARY OF ARGUMENT

Amici contend that the ordinary canons of statutory interpretation support the Seventh Circuit's conclusion below that the Racketeer Influenced and Corrupt Organizations ("RICO") chapter of the Organized Crime Control Act of 1970, Pub.L. 91-452, Title IX, 84 Stat. 941 (1971), requires an economic element in the terms "enterprise" and in the predicate acts subject to its provisions. *NOW v. Scheidler*, 968 F.2d 612, 626-29 (7th Cir. 1992). The issue,

however, only arises because of the evident ambiguity in the concept of "enterprise" within 18 U.S.C. § 1962(c) (1989), and in the type of motivation required for a predicate act. It is that ambiguity and its clarification which Amici address in this brief.[1]

Ambiguity occurs where a statutory term has alternative or contradictory referents. Amici contend that when a congressional statute intrudes upon fundamental constitutional or structural interests, the clear statement rule is the appropriate mechanism to resolve any ambiguity in statute's terms or application. Moreover, whenever such constitutional or quasi-constitutional interests are at stake, the clear statement rule establishes a high threshold, analogous to the clear and convincing standard of proof for finders of fact, that must be met to find that Congress did indeed intend to intrude upon the traditional structures of the American constitutional order.

The civil provisions of RICO are, and were intended to be, an adjunct to the criminal proscriptions designed to attack the economic strengths of organized crime and of commercial criminality generally. Petitioners have brought a civil action under federal law against Respondents by alleging that Respondents have engaged in non-economic behavior that would normally be dealt with by the criminal codes of the several states. The defining and penalizing of criminal behavior is traditionally a function of the state legislatures. Under Petitioners' view of RICO,

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[1] Letters of consent to the filing of this brief are on file with the Clerk of the Court.

the decision whether to subject individuals and enterprises to civil prosecution is made on a case by case basis by persons who are not politically accountable. Yet the method of enforcing and prosecuting such proscriptions is a core part of the discretion of the executive departments of the individual states and their subdivisions.

Accordingly, under Petitioners' own interpretation of the applicable provisions of RICO, Congress has altered the federal-state balance and intruded upon the core functions of the states by delegating prosecutorial decision making to politically unaccountable actors. Under the interpretive precedents of this Court, the clear statement rule provides a basis for resolving the dispute with due respect for the powers of Congress and the role of the states whenever those fundamental interests may be intruded upon by Congress. The rule mandates that Congress leave no ambiguity in RICO if the intent of Congress was to make such a wide range of non-economic activity subject to federal sanction.

Finally, under the private civil enforcement portion of RICO, 18 U.S.C. § 1964(c) (1989), permitting treble damages and lawyer's fees, Respondents would be subject to far greater penalties than under state criminal prosecution, if Petitioners' expansive view of Respondents' liability under Section 1962(c) is countenanced. If Respondents are in fact subject to a potentially greater penalty under the civil provisions of RICO than they would be under the criminal laws of the states, and there is a genuine ambiguity in the meaning of the text, then, under the rule of lenity, any such ambiguity should be resolved in favor of the lesser penalty.

ARGUMENT

I. CONGRESS DID NOT CLEARLY INTEND SECTION 1962(C) OF RICO TO REACH ENTERPRISES OR PREDICATE ACTS THAT ARE NON-ECONOMIC

Petitioners below sought treble damages and lawyer's fees under 18 U.S.C. § 1964(c) (1989) by alleging that Respondents violated 18 U.S.C. § 1962(c) (1989) through the commission of predicate acts defined within 18 U.S.C. § 1961(1) (1989).[2] Central to Petitioners' cause of action is the notion that the "enterprise" of the Respondents, as found in Section 1962(c), need not be economic or commercial, and that the motivation for the alleged predicate

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[2] Section 1964(c) reads:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962(c) reads:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The relevant portion of Section 1961(1) reads:

"racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 [the Hobbs Act] (relating to interference with commerce, robbery, or extortion). . . .

acts need not require an economic element. Brief of Petitioners at 15-25. In a reasoned exercise in statutory interpretation and case law, the Seventh Circuit below dismissed plaintiffs' cause of action, stating, "[W]e believe that congressional concerns may not have extended so far as the activities of political terrorists which involve neither economic crimes nor economic motivations." *NOW v. Scheidler*, 968 F.2d at 628 (adopting the reasoning of *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983)).

The issue of the case comes down to defining the content of two ambiguous elements in RICO, "enterprise" and motivation, and the constitutionally appropriate method for resolving the ambiguities.

A. "Enterprise" and the Requisite Motivation for Predicate Acts Are Ambiguous Concepts Within RICO

Although Amici are persuaded of the Seventh Circuit's conclusions,[3] the fact is that the text of Section 1962(c) is ambiguous in its definition of enterprise and in the required motivation for the predicate acts. The clear

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[3] Amici also associate themselves with Brief of Respondents Joseph M. Schiedler, et al., in contending that the text, context, structure, legislative history and application of RICO point to the statute's requirement of a commercial element for each covered enterprise or predicate act. Nevertheless, the court below and Respondents base their conclusions on the evident fact that there is some element of ambiguity in the two elements at issue. Amici contend that the clear statement rule can and should be applied to resolve that ambiguity.

statement rule provides the appropriate standard for resolving those ambiguities.

A statutory provision is ambiguous when it is capable of bearing "at least two meanings." *Deal v. United States*, 113 S.Ct. 1993, 1997, n.1 (1993) (holding that the term "conviction" did not, in context, have more than one meaning).[4] Language is symbolic and nearly always refers to a concept or concepts outside of itself.[5] Ambiguity is a description of relative uncertainty, found wherever language can have variable signification. A statutory provision is ambiguous if it has alternate or contradictory referents. A reference to "residence," for example, may mean an abode or a legal domicile.[6] Similarly, ambiguity may also be present when an unstated material element

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[4] The Oxford English Dictionary (O.E.D.) defines ambiguity as the "capability of being understood in two or more ways." 1 O.E.D. 386 (2d ed. 1989). Consequently, the first rule of statutory interpretation, relying on the plain meaning of the language, does not apply. *See* SANDS, SUTHERLAND STAT. CONST. § 46.01 (4th ed. 1984) (plain meaning of language "admits of no more than one meaning").

[5] C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING 9-10 (8th ed. 1948).

[6] REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 23 (1965). Unlike homonyms, where the same term used twice carries discernibly different referents, (e.g., "the bear's owner bears liability") ambiguity occurs when the term does not limit itself to one series of harmonious symbols. *Id.* at 24.

An ambiguity may also occur when it is not clear whether the particular term stands for a narrow or a broad range of allied symbols. See, for example, the debate within the Court on the meaning of the term, "use" of a firearm. *Compare Smith v. United States*, 113 S.Ct. 2050, 2054 (1993) *and id.* at 2061 (Scalia, J., dissenting).

within the statute is not defined, leaving it without a clear referent.[7]

In the issue before the Court, there are alternative referents for the term "enterprise" within Section 1962(c). An enterprise could be "a business venture or undertaking," BLACK'S LAW DICTIONARY 79 (6th ed. 1990), or simply "an undertaking, a project." WEBSTER'S NEW 20TH CENTURY DICTIONARY 606 (2d ed. 1983). Moreover, it is not clear within the terms of RICO whether the motivation for committing any of the predicate acts in incurring liability must be economic.

In determining what a statutory term's referents are, a court will utilize a number of interpretive modes and maxims, often progressively moving to different frameworks of definition.[8] Commonly, the court fixes on the term's definition within the statute. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) ("racketeering activity" in RICO limited to definitions in Section 1961(1)). Alternatively, the court will look to the term's legal or "ordinary meaning" in the language. *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (citations omitted). But perhaps most frequently, the court will seek illumination of meaning of the term in the context of other words in

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[7] Beyond semantic ambiguity of terms, there can also be syntactic ambiguity, arising from the confusing placement of modifiers, as well as contextual ambiguity, in which two or more parts of a statute are inappropriately made parallel. *See* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING at 73-97.

[8] If an ambiguity is impossible to resolve, then a statute may be unconstitutionally vague, but the canons of statutory construction normally work to avoid that result. SANDS, SUTHERLAND STAT. CONST. § 21.16.

the statute, or in the statute's purposes, or in its legislative history.[9] In *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993), for example, this Court examined the content of the terms "to conduct or participate" in an enterprise's affairs within Section 1962(c). In attempting to resolve any uncertainty in the meaning of the terms, the Court looked to varying definitions, the context of Section 1962(c), the purpose of RICO and its legislative history. The Court found that "to conduct or participate" in an enterprise's affairs was limited to having a managerial or directive role in the enterprise. 113 S.Ct. at 1169-71.

Other case analyses of the "sometimes ambiguous language" of RICO, *Plount v. American Home Ins. Co.*, 668 F. Supp. 204, 206 (S.D.N.Y. 1987), have utilized the tools of statutory interpretation to unravel complexities of meaning,[10] often directly confronting the question of ambiguity.[11]

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[9] Courts will also use contextual maxims, such as *ejusdem generis, expressio unius est exclusio alterias,* and *in pari materia* to gloss a term's meaning. SANDS, SUTHERLAND STAT. CONST. § 47.

[10] This Court has applied methods of context, purpose, and history to resolve the meaning of terms that may have had some facial ambiguity. *See Reves*, 113 S.Ct. at 1169 ("conduct" in Section 1962(c) means that a defendant must have had "some degree of direction" in the enterprise); *Sedima*, 473 U.S. at 495 ("racketeering activity" in Section 1962(c) means no more than the predicate acts listed under Section 1961(1)); *Russello v. United States*, 464 U.S. 16, 22 (1983) ("interest" in 18 U.S.C. § 1963(a)(1) (1989) includes money or profits); *United States v. Turkette*, 452 U.S. 576 (1980) (an "enterprise" may comprehend illegitimate associations, but not a "pattern of racketeering activity").

[11] In *United States v. Masters*, No. 88-CR500-1, 1989 U.S. Dist. LEXIS 6142 (N.D.Ill. May 12, 1989), for example, the court specifically found that the term "enterprise" was ambiguous as

To resolve the ambiguity in Section 1962(c) whether an enterprise can include any form of undertaking, even one without an economic component, the court below employed context and case law. 968 F.2d at 626-29. In their Brief, Respondents marshal impressive evidence to demonstrate that enterprises and predicate acts are limited to commercial or economic entities and motives. Appropriate to settling the question, however, is the clear statement rule, a canon of construction long used by this Court. Its application will resolve any remaining ambiguity in favor of Respondents.

B. The Clear Statement Rule Requires That Congress Clearly Show That 18 U.S.C. § 1962(c) Was Intended to Apply to Non-Economic Enterprises or Predicate Acts

The clear statement rule will be invoked to resolve an ambiguity when a statute trenches upon traditionally important interests in our constitutional order. *United States v. Bass*, 404 U.S. 336, 349 (1971). If Congress seeks to regulate an area normally outside its purview, it must make its intent clear, unmistakable, or manifest. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1988). The

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applied to groupings of associations as distinguished from groups of individuals. To resolve the ambiguity, the court applied the canon of statutory purpose to include groupings of associations within the statute's concept of "enterprise." In contrast, the Second Circuit found that there was "no ambiguity" in the words of the statute in applying its provisions to public utilities. *City of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990).

rule provides a grounding to statutory interpretation in areas where Congress may have inadvertently impinged upon constitutional or quasi-constitutional interests. The interpretive evidence must be sufficiently weighty to indicate that Congress clearly intended the extension of its power to such a degree. "[T]o depart from an established *principle*, the legislature must speak plainly." Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221, 264 (1973) (emphasis in original).[12]

The rule affirms the political checks upon the legislative process. It requires that where Congress has the capacity to govern, Congress must exercise its rule clearly and articulately when its legislation may affect areas of the American polity traditionally enjoying a range of discretion free from federal or congressional regulation. The Court has been particularly vigilant when Congress, as in RICO, has exercised its enormous powers under the Commerce Clause. U.S. CONST. art. I, § 8.

> A law will not be held to affect all the activities Congress can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full.

LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 316 (2d ed. 1988) (emphasis in original).

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[12] In constitutional terms, the clear statement doctrine is the analogue of the maxim that statutes in derogation of the common law should be strictly construed. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 716 (1983) ("[T]he Court has presumed in the absence of a clear indication to the contrary that Congress

When Congress intrudes upon traditional state interests under the Commerce Clause, the protection of the States lies primarily in the political process, *Garcia v. Metropolitan Transit Auth.*, 469 U.S. 528 (1985). In such a situation, the Court "must be absolutely certain that Congress intended such an exercise." *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2403 (1991). By means of the Supremacy Clause, U.S. CONST. art. VI,

> Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federal system. It is a power that we must assume that Congress does not exercise lightly.

Id. at 2400.

By requiring that the results of the political process be unambiguous, the Court also protects its own capacity and its own role to assay what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. at 349.

Accordingly, courts have required a clear statement when a statute purports to alter the federal-state balance, particularly in criminal matters under the Commerce Clause, *id.*, or when it may impinge upon a state's core functions, *Ashcroft*, 111 S.Ct. at 2400-01, or limit a state's immunity from suit under the Eleventh Amendment,

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did not mean by its use of general language to contravene fundamental precepts of the common law") (Blackmun, J., dissenting).

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985), or condition the grant of federal funds to states, *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 24 (1981), or preempt an activity historically regulated by the states, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations omitted), or constrain judicial review of administrative decisions, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), or violate a rule of international law, *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), or extend extraterritorial jurisdiction, *EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227, 1229-30 (1991) (citations omitted), or regulate First Amendment interests, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979), or curb a federal privilege or immunity, *Kent v. Dulles*, 357 U.S. 116, 129 (1958), or, in general, delegate "critical decisions, especially those implicating constitutional values, to less politically accountable agents." Evan Carminker, *A Norm-based Remedial Model for Underinclusive Statutes*, 95 YALE L. J. 1185, 1206 (1986) (noting that the clear statement rule has become a substitute for the non-delegation doctrine).

As an "ordinary rule of statutory construction," then, the clear statement rule is applied whenever it is asserted that Congress intended to alter the "usual constitutional balance" between the Federal government and the states. *Will*, 491 U.S. at 65 (citations omitted). Its function is to "divine the meaning of otherwise ambiguous statutory intent." *EEOC v. Wyoming*, 460 U.S. 226, 224, n. 18 (1983), and serve as a background context for evaluating the interpretive evidence.

For the interpreter of the statute, the clear statement rule serves the same function as does the clear and

convincing standard for the finder of fact. The clear and convincing standard protects "particularly important individual interests in civil cases." *Addington v. Texas*, 441 U.S. 418, 424 (1978). The interests protected by the clear statement rule "derive from the Constitution itself." *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S.Ct. 560, 567 (1991) (O'Connor, J., dissenting). Because certain interests are so fundamental to our legal order, a higher burden than preponderance is placed on the party asserting that the interest has been overcome.

In the ordinary situation, where there are no fundamental interests at stake, the usual maxims of statutory interpretation resolve any ambiguity on the basis of preponderance of the relevant data or principles. But in other situations, where constitutional and quasi-constitutional presumptions operate against Congress' exercise of its acknowledged power, then a greater level of persuasiveness is required. That is the function of the clear statement rule.[13]

On the other hand, it is often stated that if there be "no ambiguity" whatever, the clear statement rule does not apply. *City of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1305-06 (2d Cir. 1990). Analytically, however, when a court says that there is "no ambiguity," the court in fact has decided that the statute's meaning has met the clear statement rule from the outset, and that there is no need to invoke it explicitly to limit the purported sweep

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[13] William Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1065 (1989).

of the provision. Thus, if a court finds that the intent of Congress to enter an area traditionally reserved to the states is evident on the face of the statute, then Congress has *a fortiori* met its burden under the clear statement rule, and the court need go no further. A finding of "no ambiguity" simply restates the conclusion that the high level of "proof" required by the rule has been met. Indeed, in some cases this Court has declared that the clear statement rule *requires* that there be "no ambiguity." *Atascadero*, 473 U.S. at 242 (Congress's intent must be "unmistakably clear in the *language* of the statute") (emphasis supplied).

If, on the other hand, the clear statement rule did not provide a background context for evaluating the interpretive evidence from the start when fundamental interests were at stake, but was only brought in at the end of the day when the traditional canons of statutory construction yielded no answer, there would hardly be any occasion for its use. Rare indeed would there be a provision whose statutory definition, or dictionary definition, or contextual use, or relation to the purpose of the legislation, or place in the legislative history, or its gloss by other maxims of statutory interpretation would still fail to have some preponderant meaning. But the clear statement rule demands more than mere preponderance. It sets a higher threshold for the evaluation of the interpretive evidence in all cases when Congress moves into areas outside its traditional purview.

In the case at bar, any clear Congressional intent to include non-economically motivated offenses within the scope of RICO cannot be found in the text or legislative

history. The statute aims at illegal commercial combinations and activities. Any indication otherwise is, at most, ambiguous. At the same time, the statute trenches upon the traditional federal-state balance in criminal matters, and redirects the states' core power of choosing how to enforce criminal proscriptions. For either or both of these considerations, Congress is obligated to have made its intention clearly stated before modifying such fundamental structures and interests of the American constitutional system. It has not done so.

1. Congress Did Not Clearly Intend to Alter So Dramatically the Federal-State Balance by Including Non-Economic Enterprises or Predicate Acts within the Prohibitions of RICO

As part of the Organized Crime Control Act of 1970, RICO was obviously designed to involve the federal government in a far greater degree in combatting the influence of organized crime on the economy of the nation than ever before. The change in the federal-state balance was dramatic, and, in terms of economically motivated delicts, intentional. *Turkette*, 452 U.S. at 586-87 (citations omitted). But there is no indication that Congress meant to federalize such a wide range of non-economically motivated crimes as Petitioners would desire.[14] Any such objective of Congress would have to be stated clearly.

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[14] In their complaint below, Petitioners assert the violation of a federal statute, 18 U.S.C. 1951 (1989) (the Hobbs Act), as a predicate act to Respondent's liability. However, if the concept of "enterprise" and the requisite motivation for predicate acts are expanded to include non-economic entities and purposes, then not only would a wider range of predicate acts under

> [W]henever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

Bowen v. American Hosp. Ass'n, 476 U.S. 610, 645 (1985) (plurality), quoting *Florida v. United States*, 282 U.S. 194, 211-212 (1931). Without a clear statement, this Court will not "transform relative minor state offenses into federal felonies." *Rewis v. United States*, 401 U.S. 808 (1970).

The transformation of ordinary non-economically motivated state criminal law into a federal cause of action would be a singular change in our federal system, made all the more dramatic because of the effect of Section 1964(c), which Petitioners wish to take advantage of. Civil in form, and modeled after the Clayton Act, 15 U.S.C. § 26 (1989), private treble damages actions are part of a wide ranging criminal statute and are dependent upon acts that are in fact criminal. Yet Section 1964(c) was passed by Congress almost as an afterthought, and with hardly any forethought. Added in the House of Representatives after the Senate had passed its form of RICO, the Senate merely acquiesced in the House's action. The question did not even go to a Conference Committee. The new private enforcement action simply "slipped quietly into the statute." *Sedima*, 473 U.S. at 507, 519 (Marshall, J.,

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federal law be available for treble actions damages, an extraordinary amount of state law under Section 1961(1), not directed at commercial crime, will have been federalized.

dissenting).[15] To infer that Congress meant to federalize ordinary non-economically motivated state criminal law through private action by such a casual process is both dubious and inappropriate in our federal system.

It is precisely to guarantee that states are represented in a process that can undo their own considered policies that the clear statement rule arises. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 480 (2d ed. 1988), quoted in *Ashcroft*, 111 S.Ct. at 2403 (emphasis in original). No such statement is in the statute. No such intent is clearly evinced in the debates.

It is true that the provisions of RICO are to be "liberally construed to effectuate its remedial purposes," Pub.L. 91-452, § 904(a), 84 Stat. 947 (1971), but the objective which the statute was designed to remedy was to break the deleterious hold that organized crime had on the interstate economy, and, indeed, "to seek the eradication of organized crime in the United States," Pub.L. 91-452, 84 Stat. 922, 923, by attacking "organized commercial exploitation" generally. 116 CONG. REC. S18940 (daily ed. June 9, 1970) (remarks of Senator McClellan). There is no ambiguity in Congress's casting a broad net over illegal commercial activities to snare the organized criminal. *H.J. v. Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2905

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[15] Section 1962(c)'s "entrance [into the statute] evinces absolutely no intent to revolutionize the enforcement scheme, or to give undue breadth to the broadly worded provisions." 473 U.S. at 519 (Marshall, J., dissenting).

(1989). But as the Court noted in *Reves*, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." 113 S.Ct. at 1172. Accordingly, the civil remedies of Section 1964 find their utility "in eradicating organized crime from the social fabric," *Turkette*, 452 U.S. at 585, not in reaching non-economic activities that private plaintiffs may now wish to target. "The aim," the Court has said of the civil remedies provisions, "is to divest the association of the fruits of its ill-gotten gains." *Id.*

In permitting Congress to attack organized crime at all levels in our country, the Court has allowed for a very wide amount of overinclusiveness in the statute. *Sedima*, 473 U.S. at 497. Drawing a line between what is "organized crime" and what are other forms of criminal economic consortia is problematic. The result is that the vast majority of private action suits have nothing to do with organized crime. Report of the Ad Hoc Civil RICO Task Force of the ABA Section on Corporate, Banking and Business Law 499, n.16 (1985). But to extend RICO to a category of activities having no tangential connection to organized crime is to go far beyond the intention of Congress. It would upset the federal-state balance on a mere mechanical inference. The clear statement rule requires more. As the Eighth Circuit declared,

> [A]n expansive definition of the term "enterprise" will not necessarily effectuate the remedial purpose of RICO to eliminate the infiltration of racketeers into our business economy.

United States v. Anderson, 626 F.2d 1358, 1370 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). If, under the

Commerce Clause, Congress wanted to do more, it was obliged to indicate it clearly.[16]

2. The States' Core Power to Enforce Their Own Criminal Laws May not be Altered or Delegated to Politically Unaccountable Agents by Congress without an Explicit Statement of Intent

In passing RICO, Congress not only federalized a large component of state criminal law, but, through Section 1964(c), Congress also redirected the manner in which such state law should be enforced for economically motivated crimes. Congress, however, has not clearly indicated its intent to remove discretionary enforcement powers from the states' executives and delegate them to politically unaccountable actors who may civilly prosecute non-economically motivated crimes. Accountability to the public for the formulation and execution of public policy is essential to the functioning of our separated and diffuse governmental structure. *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

Where *Bass* requires that Congress utilize a clear statement when impinging on a state's legislative powers, 336 U.S. at 349, *Ashcroft* requires an explicit intent if Congress seeks to alter the state's method of formulating

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[16] *See, for example, McNally v. United States*, 483 U.S. 350 (1987) (in absence of clear statement by Congress, Court will not read mail fraud statute expansively to impinge upon local standards for government officials); *United States v. Yokley*, 542 F.2d 300 (1976) (Hobbs Act limited to "racketeering" to leave ordinary state criminal offenses free from federal ambit).

public policy, including its executive discretion in enforcing the law. 111 S. Ct. at 2401-02 (citations omitted) (affirming the states' essential interest in formulating public policy). Congress must explicitly provide for any such reallocation of state executive authority.

> The maintenance in our federal system of a *proper distribution* between state and national governments *of police authority and of remedies private and public for public wrongs* is of far reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940) (emphasis supplied).

Private actors are not bound by the same policy constraints as are public officials. "Unlike the Government, private litigants have no reason to avoid displacing common-law remedies." *Sedima*, 473 U.S. at 504 (Marshall, J., dissenting).[17] The incentives for a group committed to make public policy by private attorney general suits is great. Acts which are mere misdemeanors under state criminal law can wreak a far greater penalty on the

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[17] The fact that a number of state attorneys general, including the Attorney General of Ohio, have entered an amicus brief on behalf of Petitioners is itself disturbing, for they ask that this Court infer from an ambiguous provision a wholesale change in the states' manner of enforcing state law without either Congress or the states' own politically accountable institutions directing such a change. If the law enforcement mechanisms of the states are indeed so stretched to the limit that they cannot contend with abortion protesters' violations of state law, then the attorneys general should repair to their own legislatures to authorize the citizenry to enforce the law through private attorney general actions.

actor under Section 1964(c). The treble damages provision and the application of attorney's fees can easily exceed any possible fine the defendant may be liable for under state criminal law.[18] Furthermore, since liability is attached by a preponderance of the evidence, the chances of one being found liable are far greater than in a state criminal proceeding.

If setting the agenda of the states' legislative process can be intrusive, *FERC v. Mississippi*, 456 U.S. 742, 779-81 (1982) (O'Connor, J., dissenting), how much more so is displacing the executives' discretion in prosecutorial enforcement. *See Morrison v. Olson*, 487 U.S. at 696 (Executive retains sufficient control over independent prosecutor to perform his duties) and 706 ("Governmental investigation and prosecution of crimes is a quintessentially executive function") (Scalia, J., dissenting). Under our mixed system of government, executive officials remain accountable to the people of their respective states for the exercise of prosecutorial discretion. Private attorneys general actions remove the element of political accountability from those who bring their fellow citizens before the bar of justice. The state's prosecutors are not involved, nor are the federal. The restraint of prosecutorial discretion is no bar. *Sedima*, 473 U.S. at 503-04 (Marshall, J., dissenting) (comparing the responsible use of prosecutorial discretion under RICO with the lack of restraint by private parties in civil prosecutions).

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[18] *See Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466 (3rd Cir. 1989) in which an award of $2,661 in treble damages was enhanced by provision of attorney fees and costs of $64,946.11. 889 F.2d at 470.

If, under the Commerce and Supremacy Clauses, Congress decides to federalize an area of the criminal law and delegate part of its enforcement to the private interests of individuals, it may do so, but it must do so openly and clearly. The clear statement rule guarantees that, through the political process, the states are fully apprised of the change in their respective policies and powers. Congress remains accountable. But if Congress has not clearly articulated its intent to modify or displace state prosecutorial discretion, and the courts do so by judicial decision, "the accountability of both state and federal officials is diminished." *New York v. United States*, 112 S.Ct 2408, 2424 (1992).

Congress' intent to alter one of the core powers of the states in attacking organized crime, illegal commercial combinations, as well as economically motivated crimes generally, has been authenticated. *Sedima*. But if Congress truly intended to convert entire areas of non-economically motivated state criminal law, and to redirect the manner of its enforcement through treble damages suits based on preponderance of the evidence, then it behooved Congress to say so explicitly. The federal courts do not favor "implied inroads in state authority." *West Helena S. & L. v. Federal Home Loan Bank Bd.*, 417 F.Supp. 220, 229 (1976), *aff'd*, 553 F.2d 1175 (8th Cir. 1977).[19]

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[19] In *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), the Court refused to infer a private right of action in the Securities Exchange Act of 1934 without a clear indication of Congress because it would undermine state policies of corporate regulation.

Congress can encourage private actions suits to further federal policy. Where it has done so, it has done so explicitly. Congress can provide for variable punishments for the same offense. Where it has done so, it has done so explicitly. But Congress has not done so in the terms of Section 1962(c) as it is enforced through Section 1964(c). National power should not be placed in the hands of private groups with their own policy agendas without deliberate and considered action by Congress. Such a fundamental change in the manner in which the states enforce their own statutes, so far from the purpose of combatting commercial crime, should not be acquiesced in by mere inference. Otherwise, an unjustifiably expansive interpretation of Section 1962(c), together with Section 1964(c) will do more than just alter the federal-state balance. It will actually displace the state criminal enforcement process without the political accountability for such a change at either the state or federal level.

II. UNDER THE RULE OF LENITY, ANY AMBIGUITY IN THE MEANING OF ENTERPRISE OR IN THE MOTIVATION FOR PREDICATE ACTS SHOULD BE RESOLVED IN FAVOR OF THE LESS HARSH PUNISHMENT

Howsoever the term enterprise is defined in Section 1962(c), howsoever are motivations delineated, the result will apply to criminal as well as civil actions. *H.J. v. Northwestern Bell*, 109 S.Ct. at 2909 (Scalia, J., concurring). If there be one pole star that has guided common law courts in their reading of criminal statutes, it is *nullum crimen sine lege*, the principle that "no conduct may be held criminal unless it is precisely described in a penal

law." JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).[20] It is, indeed, a grounding to the rule of law itself. As Chief Justice Marshall affirmed,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

In criminal statutes, the clear statement doctrine finds its sibling in the rule of lenity. Strict construction and the rule of lenity in defining ambiguous statutes go hand in hand.

> [W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

United States v. Universal C.I.T. Credit Corporation, 344 U.S. 218, 221-22 (1952). The Court will look to see if Congress has fixed the penalty "for a federal offense clearly and without ambiguity." *Bell v. United States*, 349 U.S. 81, 84

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[20] The alternative formulation, referring both to indefinite laws and indefinite penalties is *nullum crimen, nulla poena, sine lege*. *Sparf and Hansen v. United States*, 156 U.S. 51, 87 (1895).

(1954). If not, "doubt will be resolved against turning a single transaction into multiple offenses." *Id.*

Where Congress clearly wants the harsher alternative, the rule of lenity is of no avail. But where, as here, the Court must choose between two meanings of an ambiguous statute, one of which will subject a defendant to possible federal prosecution and greater penalties under private action, the rule of lenity requires the less harsh alternative. In *United States v. Enmons*, 410 U.S. 396 (1973), declaring that "any ambiguity must be resolved in favor of lenity," *id.* at 411, this Court resisted the Government's call for an expanded reading of the Hobbs Act to cover damage to property resulting from union activity. Similarly, the desire to expand the term enterprise in the case *sub judice* must be rejected. If Congress wishes to expand the list of culpable acts and increase the range of penalties to be attached to them, it must say so forthrightly.

CONCLUSION

Congress may at any time expand RICO to encompass non-economic enterprises or predicate acts. If it does so clearly and unambiguously, the participation of the states in the political process will be guaranteed, the change in federal-state relations will have been consented to by those who must bear the brunt of the change, and those who may be subject to enhanced penalties will know what lies in store. Until that happens, ambiguities

in RICO must be resolved in favor of Respondents. The decision of the Seventh Circuit should be affirmed.

Dated: September 29, 1993

Respectfully submitted

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APPENDIX

DESCRIPTION OF *AMICI*

OHIO RIGHT TO LIFE SOCIETY, INC.

The Ohio Right to Life Society is a non-for-profit non-denominational organization of citizens of the State of Ohio who promote respect for human life at all stages of development. The primary purpose of the Ohio Right to Life Society is to present fully detailed and factual information upon which individuals and the general public may make an informed decision about the various topics of fetal development, abortion, alternatives to abortion, euthanasia, and infanticide. The Society seeks to make available factual information concerning support systems and services for women who are or may be pregnant and in need of assistance.

CLEVELAND LAWYERS FOR LIFE, INC.

Cleveland Lawyers for Life, Inc. is a not-for-profit organization organized to encourage among the general public an understanding of the dignity and worth of each individual human life, whatever its state or circumstance, and to foster respect for life before and after birth, particularly for the innocent, the incompetent, the impaired and the impoverished. To these ends, the organization promotes and engages in educational activities, and makes available, on a *pro bono* basis, its services and expertise.

PHYSICIANS FOR LIFE, INC.

The objectives of Physicians for Life, Inc., a not-for-profit organization, is to uphold the sanctity and dignity of human life at all stages of development, and to reaffirm the unique value and worth of every human life in all situations of health or ill-health, and at any age. Physicians for Life sponsors research and educational programs that promote respect for life, develops programs to assist pregnant mothers, their unborn children and their families, and aids those experiencing crisis, especially arising from situations of pregnancy or from death.